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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 567

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Pan-Atlantic Steamship Corporation, petitioner, prays that a writ of certiorari be issued to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case, which became final upon the denial of its petition for a rehearing on August 26, 1940 (R. 158).

Summary Statement of the Matters Involved.

This case involves nullification of three provisions of bills of lading in common usage by ocean carriers, and the interpretation of two Federal Maritime Statutes.

1. In June, 1937, the Barber-Wilhelmsen Line, hereinafter referred to as "Wilhelmsen", issued in the Philippine

Islands bills of lading to the libellants for two shipments of goods consisting of 500 bales of manila fiber and 67 coils of manila rope which shipments were later destroyed by fire in New York Harbor while being transported by the Manhattan Lighterage Corporation, an independent lighter carrier, from the initial carrier to the petitioner (Findings of Fact, 2, 11, 12, R. 122, 124, 125).

2. The bills of lading between the shippers and Wilhelmsen, the initial carrier, contained the following provisions which the District Court and the Circuit Court of Appeals held illegal and null and void as contrary to the Harter Act, 46 U. S. C. A. 190 (B. of L. R. 8-22, Exhibits 8, 9, R. 62; Conclusions of Law V, VI, VII, R. 128; C. C. A. opinion, R. 147).

> "11. (g) It is agreed that each of the Carriers shall be responsible only for the goods whilst same are in their own personal custody. The arrangements for through carriage are made for the convenience of shippers, and the responsibility of each Carrier with regard to the carriage and storage by other means than its own vessels or other vehicles or stores is to be that of forwarding agent only, and any claim for loss, damage or delay must be made only against the person or company in whose custody the goods actually were at the time when the loss, damage or delay was caused or arose" (R. 19).

> "11. (e) * * * The shipowner is not, and shall not be deemed to be the agent for such carrier or carriers nor shall the shipowner be liable in any respect whatever for any loss, damage, delay in regard to the goods after they shall have left the ship's deck and/or tackle where the ship's responsibility shall cease * * *" (R. 18).

> "4. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from any of the following perils,

causes, or things, namely: * * * lighterage to or from the vessel, transshipment, landing, jettison, explosion, heat, fire, on board or on shore, at any time or in any place * * *; whether any of the perils, causes or things above mentioned, or the loss, damage, or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether in relation to the navigation, management, or stowage of any carrying vessel, or otherwise, and whether on board the said ship or any other ship belonging to, or chartered by, them, for whose acts they would otherwise be liable, or otherwise howsoever" (R. 13-14).

3. The said goods were delivered to Wilhelmsen at Philippine ports under bills of lading calling for shipment to Peoria, Ill., and St. Louis, Mo., via New York and New Orleans, La. (Findings of Fact 2, R. 122). Wilhelmsen, operating a line between Manila and New York, made no calls at Gulf ports. The petitioner, Pan-Atlantic Steamship Corporation, hereinafter referred to as "Pan-Atlantic", maintained a line from New York to the Gulf (Findings of Fact 6, R. 123).

4. On July 28, 1937, Wilhelmsen wrote Pan-Atlantic that the SS. "Tai Yin", one of their ships, would arrive in New York August 2, 1937, with said merchandise on board for shipment to New Orleans, saying,

> "* * * we would thank you to lodge orders with the Manhattan Lighterage Corp., covering transfer of the above mentioned cargo as soon as same is available" (R. 86, Exhibit 1, R. 44).

Pan-Atlantic accordingly placed an order with the Manhattan Lighterage Corporation, hereinafter referred to as "Lighterage Company," an independent carrier operating some 45 boats and having no connection with Pan-Atlantic

or Wilhelmsen, for the carriage of said merchandise (R. 59, 96, Exhibit 11, R. 53, R. 98, Exhibit 12, R. 54).

5. The Lighterage Company, thereafter, placed the merchandise on one of its boats, the lighter "Sydney", and carried same to the dock of Pan-Atlantic, tying up at said dock to await the arrival of the steamship that would carry the merchandise to New Orleans (Findings of Fact 10, R. 124). Before said steamship arrived and while the merchandise was still on the lighter "Sydney", a fire broke out on the lighter and seriously damaged said merchandise (Findings of Fact 11, R. 124), Pan-Atlantic never having given any receipt or issued any bill of lading for said merchandise and never received it into its possession or custody (R. 51, 72).

6. There was an understanding between the parties that shipments on through bills of lading from ports of call in China and Japan by Wilhelmsen and destined for Gulf ports be divided 60% to Wilhelmsen and 40% to the Pan-Atlantic Steamship Corporation, cost of transfer at New York being absorbed on the same basis (R. 104, Exhibit 16, R. 63). Pan-Atlantic had no standing agreement with the Manhattan Lighterage Corporation under which the Lighterage Company acted for them in transporting cargoes in New York Harbor, nor did it use the Lighterage Company exclusively in transporting cargoes (R. 56, 58, 59).

7. On February 27, 1937, the Lighterage Company quoted rates to Pan-Atlantic with respect to any services they might perform for it (R. 102, Exhibit 14, R. 57) and this rate-quotation letter was erroneously interpreted as an "agency agreement" between Pan-Atlantic and the Lighterage Company by the District Court (Findings of Fact 8, Conclusions of Law I, R. 124, 127) and the Circuit Court of Appeals followed the lower court (R. 148-149).

8. Libellants (shippers) brought suit against Wilhelmsen, Pan-Atlantic, the Lighterage Company and the latter's lighter "Sydney." Wilhelmsen's motion to dismiss the libel as to it was sustained and the libellants did not thereafter appeal or move to amend their libel (R. 1). The District Court (Goddard, D. J.), in dismissing the libel, stated in the course of its opinion as follows:

> "The Manhattan Lighterage Company was a connecting carrier and the initial carrier is not liable for the negligence of a connecting carrier in view of the provisions of the contract of carriage in the case at bar, Oregon-Washington R. R. Navigation Co. *v.* McGinn, 258 U. S. 409" (R. 26).

9. Thereafter, the Lighterage Company and the "Sydney" were discharged under the Fire Statute, 46 U. S. C. A. 182 (R. 2). The action then proceeded against Pan-Atlantic alone and resulted in an interlocutory decree in favor of the libellants, with an order of reference for the ascertainment of the amount of the damages (R. 138-140).

10. At the trial, the respondent, Pan-Atlantic, urged as its principal defenses that, under provisions 11(g) and (e) of the bills of lading (set out, *supra*, pp. 2 & 3), fixing the liabilities of the various carriers, it was not liable for the loss because it had not received said goods into its possession or custody at the time of the loss and the goods were damaged by fire while in the possession of an independent carrier, and as another defense that, under the Fire Statute, 46 U. S. C. A. 182, and paragraph 4 of the bills of lading (set out, *supra*, pp. 2-3), respondent was not liable.

11. The District Court and the Circuit Court of Appeals, however, declared illegal and null and void the three above

mentioned provisions of the bills of lading and held that the Fire Statute, while exonerating the Manhattan Lighterage Corporation, did not relieve from liability the respondent, because it concluded, as matter of law, that the Lighterage Company was the agent of the respondent, and although the agent was exonerated, the principal could be held liable.

12. The Circuit Court of Appeals admitted doubt as to the soundness of its position in overruling petitioner's defenses, saying:

> "Respondent makes the plausible argument that, since Manhattan, its agent, cannot be held responsible because of the Fire Statute, Pan-Atlantic, as principal, must also be exonerated on settled principles of agency law. It is quite true that a principal may not be liable if his agent is free from fault, but there are many instances where the agent has committed an unlawful act and yet is immune from responsibility" (R. 151-152).

In reference to paragraph 4 of the bill of lading, it stated petitioner's contention, saying:

> "Respondent also relies on an express provision in the bill of lading, whereby the main carriers exempted themselves from liability for damage caused by fire, in lighters or other craft, due to the negligence of the lighter's crew. If this provision is valid, Pan-Atlantic is, of course, relieved from responsibility." (R. 152.)

Questions Presented.

1. Whether the Circuit Court of Appeals has decided a Federal question in conflict with applicable decisions of this Court, namely, *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409; *Galveston Wharf Co., et al.* v. *Galveston, H. & S. A. R. Co.*, 285 U. S. 127; and *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122.

2. Whether the Circuit Court of Appeals has decided important questions under the *Fire Statute*, 46 U. S. C. A. 182, and the *Harter Act*, 46 U. S. C. A. 190, that have not been, but should be, settled by this Court.

3. Whether the Circuit Court of Appeals has rendered a decision in conflict with the rule of the Fifth Circuit Court of Appeals in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.*, 65 F. (2d) 715.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is of far reaching importance in that it has declared illegal, null and void three clauses of the bill of lading as contrary to the provision of the Harter Act, notwithstanding that these provisions have been long used by ocean carriers, and have either been sustained by this Court or have not been passed upon by it, and has left the shipping industry in a state of confusion and uncertainty.

2. The decision below construes the Fire Statute in a way never before interpreted by any court, holding where a lighterage company, which was found as a matter of law to be on-carrier's agent, was exonerated from liability for damage to a cargo resulting from the negligence of the crew of the lighter, the law and the bill of lading would not exonerate the principal, a shipowner engaged in foreign commerce, expressly exempted from such liability by the contract of the parties.

3. The decision below has construed a plain rate-quotation letter between Pan-Atlantic and the Lighterage Company as a contract making the Lighterage Company the agent of Pan-Atlantic and thereby creating rights and obligations between them never contemplated by them or

sustained by the decision of any Court and which made them liable for a risk never contemplated.

4. A reading of the 14 headnotes in the reported decision of this case, *Fyfe* v. *Pan-Atlantic S. S. Corp.*, 114 F. (2d) 72, discloses the novel and important questions to shippers in foreign commerce, raised by this case.

Conclusion.

Petitioner is entitled to a writ of certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit, to review and reverse the decision in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 567

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

BRIEF IN SUPPORT OF PETITION OF PAN-ATLANTIC STEAMSHIP CORPORATION, FOR A WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the District Court (Goddard, D. J.) sustaining the exceptions to the libel of respondents Barber-Wilhelmsen Line and holding that the Manhattan Lighterage Corporation was a connecting carrier, is unreported (R. 26). The opinion of the District Court (Leibell, D. J.) holding the on-carrier, Pan-Atlantic Steamship Corporation, the petitioner herein, liable, is unreported (R. 129-138). The opinion of the Circuit Court of Appeals affirming the District Court is reported in 114 F. (2d) 72 (R.

147) and the opinion denying the petition for reargument is reported in 114 F. (2d) 77 (R. 158).

II.

Jurisdiction.

The Circuit Court of Appeals decided the appeal July 15, 1940 (R. 147). A petition for rehearing, duly filed, was denied on August 26, 1940 (R. 158). The jurisdiction of this Court is invoked under the provisions of Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347(a).

III.

Statement and Summary of the Case.

The statement and summary of the case, with record citations, are set forth in the petition (*supra*, pp. 1-6, inc.).

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

1. In enlarging the terms of the *Harter Act*, 46 U. S. C. A. 190, by construction and holding illegal, null and void three clauses of the bills of lading (copied, *supra*, pp. 2 & 3), notwithstanding said provisions have been long used by ocean carriers and have been either sustained by decisions of this Court and the Circuit Court of Appeals for the Fifth Circuit or have not been passed upon except below in this case;

2. In construing the Fire Statute, 46 U. S. C. A. 182, never before so construed by any Court, to intend that

where a lighterage company which owned the ship on which the loss occurred has been exonerated from liability for damage to a cargo on its own ship, said Statute nevertheless permitted the court to hold the petitioner, a shipowner, liable notwithstanding the bill of lading had stipulated otherwise, and the merchandise in question had never been delivered to the petitioner, and if it were the employer of the Litherage Company that would not justify holding it liable after the Litherage Company had been exonerated;

3. In construing a plain rate-quotation letter between Pan-Atlantic and the Lighterage Company as a contract, making the Lighterage Company agent of Pan-Atlantic and thereby creating rights and obligations between them never contemplated by them or sustained by the decisions of any court and which made them liable for a risk never contemplated;

4. In concluding not to follow the law of the case as established by Judge Goddard in his final decree dismissing the libel as to Wilhelmsen, in which he held that the Lighterage Company was an independent carrier.

V.

ARGUMENT.

First Point.

The bills of lading issued by the initial carrier, Barber-Wilhelmsen Line, govern the entire transaction and fix the obligations of all participating carriers; and the clauses of the bills of lading, fixing the relationship with the carriers, are not void under the Harter Act, but expressly relieve the petitioner from responsibility for the loss sustained by the libellants-appellees, since the merchandise involved herein never came into its custody.

The bills of lading, paragraphs 11(e) and (g) (copied, *supra*, pp. 2 & 3) expressly provide that each shipper is an independent carrier and negative any joint enterprise or agency. Under the terms thereof each carrier is liable only while the goods are in its "own personal custody." Therefore, since the goods in question were not in the personal custody of the petitioner, it was expressly exonerated by the bills of lading and to hold it liable is to render nugatory the written contract of the parties and throw the whole scope of maritime contracts into uncertainty and confusion. This is contrary to the established law of merchant, sound public policy and international usage of the sea. It is introducing a novel and confusing innovation into international shipping and foreign commerce.

The paragraphs of the bills of lading fixing the relationship of the parties furthermore are valid because they merely state the pre-existing rule of the common law. *St. Louis Ins. Co.* v. *St. Louis, etc. R. R. Co.*, 104 U. S. 146; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409; *Galveston Wharf Co.* v. *Galveston H. & S. A. R. Co., supra.* In the *Galveston* case, 285 U. S. 127, 135, the bill of lading provided that the carrier in possession of the property "shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided", and this Court held that under such bill of lading a Wharf Company was not the agent of the on-carrier and was not liable for the loss. This is the very contention the petitioner here is maintaining. The facts are even more favorable to the petitioner than to the prevailing litigant in the *Galveston* case, because here the shippers and the initial carrier expressly agreed in the bills of lading that the various carriers should be responsible only for the goods "whilst same are in their own personal custody", whereas, in the *Galveston* case,

they left the determination of the liability of the various carriers to the common law, except as provided otherwise.

The Harter Act does not prevent the shipper and initial carrier from fixing the responsibility of the several carriers in a through bill of lading.

The Harter Act, 46 U. S. C. A. 190, reads:

> "*Stipulations relieving from liability for negligence.* It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

There is not a word in this Act which would prevent a shipper and an initial carrier from contracting regarding the relationships of the various carriers under a through bill of lading. Its purpose was to prevent a carrier from limiting its liability "from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of * * * merchandise * * * committed to its * * * charge."

The bills of lading in this case were prepared with the Harter Act in mind (R. 12). All paragraph 11(g) said was that each shipper would only be responsible for loss while the goods "are in their own personal custody", or, in the words of the Harter Act, only while "committed to its charge."

The Circuit Court of Appeals cites no rulings of this Court in support of its holding that the clauses in the bills of lading are illegal.

The Fifth Circuit in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.*, 65 F. (2d) 715, holds that the rule of this Court in *Oregon-Washington R. R. & Navigation Co.* v. *McGinn, supra*, applies to foreign commerce and that "each carrier is bound, in the absence of statute or contract *otherwise*, only for safe delivery to the next connecting carrier." Of course, a shipper and an initial carrier may always contract to limit the common law rule, but here they expressly contracted to adopt the substance of that rule and there is nothing in the Harter Act or decisions of this Court which holds it is illegal to so contract.

Second Point.

Pan-Atlantic Steamship Corporation, as a shipowner, is entitled to the protection of the Fire Statute, 46 U. S. C. A. 182.

The Fire Statute, 46 U. S. C. A. 182, reads:

> "*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The Fire Statute is a part of a statutory policy of Congress for certainty in the law respecting shipping and to encourage ship building and employment of ships in commerce, *Providence N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, where this Court held that the Statute must be *liberally construed in favor of carriers,* saying,

> "If the courts having the execution of it administer it (the Fire Statute) in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

The Fire Statute, in terms, relieves the shipowners "unless such fire is caused by the design or neglect of such owner", and the Statute makes no other exception to the complete immunity granted, *Earle & Stoddard* v. *Ellerman's Wilson Line*, 287 U. S. 420, 425. Certainly the fire on the lighter "Sydney" of the Manhattan Lighterage Corporation was not caused by the "design or neglect" of Pan-Atlantic for it had nothing to do with it.

The Circuit Court of Appeals reasoned that Pan-Atlantic could be held liable since it was not the actual owner or charterer of the "Sydney" and because the Lighterage Company was its agent, saying, "the lighter is but a substitute for the ship" (R. 149). If, as the court points out, the lighter was but a substitute for the ship, under the clear and unambiguous language of the Statute, Pan-Atlantic should have been exonerated since the court held that the fire was not caused by the design or neglect of the owner. The court cites no decisions of this Court or any other Federal Court in support of its proposition that Pan-Atlantic is not entitled to the benefit of the Statute, but holds that the loss may be laid at the principal's door on the theory of the rule established by the New York Court of Appeals in *Schubert* v. *August Schubert Wagon Co.*, 249 N. Y. 253 (R. 152). That case has no application in con-

nection with an interpretation of the Federal maritime protective statute. The New York case was an automobile negligence case in which a wife was run down by a truck driven by her husband, and the wife was permitted to recover from her husband's employer although the husband himself was immune from suit.

Not only has the Circuit Court of Appeals refused to adopt a liberal construction of the statute, but has interpreted it in a manner never before construed by any court In *The Munaires*, D. C. E. D. La., 12 F. Supp. 913, the Fire Statute recently was *liberally* construed to hold that a carrier is not responsible for fire on a wharf that it had leased and was using exclusively. The Circuit Court of Appeals expressly disagreed with this case, saying, "Insofar as *The Munaires* may be interpreted to express views otherwise, we cannot agree" (R. 153).

Assuming, for the sake of argument only, that the Fire Statute does not by its own terms extend to this situation, it is competent to extend it by contract. The bills of lading so provide, paragraph 4 (copied, *supra*, pp. 2-3). In the opinion of the Circuit Court of Appeals it is pointed out "If this provision is valid Pan-Atlantic is, of course, relieved from responsibility" (R. 152). Why is the clause of the bill of lading not valid? It can only be rendered invalid by judicial construction and no court, except the court below, has directly held such a clause to be invalid. In *The Munaires*, 12 F. Supp. 913, 917, it was held that a shipowner could extend a statutory exemption from fire by contract, saying, "the shipowner is entitled to the benefit of the Fire Statute or bill of lading exemption, as the case may be", citing, *Earle & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420, and *Constable* v. *National S. S. Co.*, 154 U. S. 51, 62.

Third Point.

The Circuit Court of Appeals erroneously concluded as a matter of law that the Manhattan Lighterage Corporation was Pan-Atlantic's agent.

The carrier which had the goods aboard was exonerated and so, of course, the company that had not yet received the goods should be held to be equally free from liability. There was no agency relationship between the two carriers.

The Circuit Court of Appeals said, "Pan-Atlantic had a general contract with Manhattan for lightering its shipments. Manhattan was not an independent carrier" (R. 149). Pan-Atlantic did not select the Lighterage Company, but was instructed by Wilhelmsen "to lodge orders with the Manhattan Lighterage Corp., covering transfer of the above mentioned cargo as soon as same is available" (R. 86, Exhibit 1, R. 44). Pan-Atlantic had no general contract with the Lighterage Company (R. 56). The Circuit Court of Appeals misinterpreted the clear and unambiguous language of a rate-quotation letter (R. 102, Exhibit 14, R. 57) from the Lighterage Company to Pan-Atlantic as a general contract (Conclusion of Law I, R. 127; R. 148-149). Never before, has such a construction been put upon a rate-quotation letter by any court, and if permitted to stand will completely alter recognized practices among ocean carriers. In this the court erred. Had the rate-quotation letter been correctly construed, there would have been no agency relationship between Pan-Atlantic and the Lighterage Company and there would be no basis for the decision, even if the *erroneous theories* of the two courts below were good law.

Fourth Point.

The decision of Judge Goddard and the final decree dismissing the libel as to Wilhelmsen established the validity

of the bill of lading clauses in so far as this litigation is concerned, so that Pan-Atlantic cannot be held liable herein.

Judge Goddard correctly followed the rule of this Court in *Oregon-Washington R. R. & Navigation Co.* v. *McGinn, supra* (R. 26). That decision, having exonerated one of the respondents, established the law of the case and should have been followed by the Circuit Court of Appeals as *res judicata* (R. 149), *Northern Pacific Ry. Co.* v. *Slaght,* 205 U. S. 122.

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1940.

No. 567.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE and JOHN T. BAILEY, Doing Business as United Fibre Company,
Respondents.

PETITIONER'S REPLY BRIEF.

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No. 567.

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vs.

JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF.

Respondents have given no convincing reason why this Court should not take certiorari in this case:

1. Respondents have failed to show why the rule of this Court, as laid down in *Oregon-Washington Co.* v. *McGinn,* 258 U. S. 409, is not applicable to this case, and have completely overlooked the conflict between the decision rendered in this case and the rule of the Fifth Circuit Court of Appeals in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.,* 65 F. (2d) 715.

2. Respondents have cited no decisions of this Court sustaining the Circuit Court of Appeals in declaring illegal and void the three provisions of the bills of lading set forth on pp. 2-3 of the petition, which even the Circuit

Court of Appeals admits that, if they are valid, petitioner would be relieved of liability.

3. Respondents give no valid reason why this Court should not take certiorari to interpret the national policy regarding shipowners' liability for fires arising in the course of maritime commerce as expressed in the Fire Statute, 46 U. S. C. A. 182, now in a state of confusion due to the conflict between the decision in this case and *The Munaires*, 12 F. Supp. 913.

A reading of respondents' brief shows that they have evaded the grounds of our application.

They rely on the conclusion of law that Manhattan Lighterage Company was the agent of the petitioner, basing this statement on the conclusion of the Circuit Court of Appeals below that Manhattan Lighterage Company was the agent of petitioner. The fallacy of that argument is shown in our Third Point (Petitioner's Brief, p. 17) and the respondents' admission now for the first time that Manhattan Lighterage Company was their own agent. At page 3 of their brief respondents say:

> "The through bills of lading issued by Wilhelmsen covering the cargo in this case, provided for transshipment at New York (Exs. 8, 9, R., pp. 9, 11, offered, R., p. 49) and set out that Wilhelmsen should be considered the shipper's agent to arrange for on-carriage (R., p. 19, offered, R., p. 49)."

Taking this interpretation of the bills of lading as correct, then the Manhattan Lighterage Company was respondents' (shippers') agent since Wilhelmsen selected Manhattan. Wilhelmsen instructed petitioner, Pan-Atlantic Steamship Corporation, "to lodge orders with the Manhattan Lighterage Corp., covering transfer of the

above mentioned cargo as soon as same is available" (R., 86, Ex. 1, R., 44). Respondent cannot be heard to complain of the negligence of the Lighterage Company that its own agent Wilhelmsen selected.

Reply to respondents' Point I, pages 4-7, reading: "Petitioner is liable for the negligent destruction of respondents' cargo".

Missouri-Pacific R. R. Co. v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366 is not in point. There, the Railroad Company was named in the bill of lading as the terminal carrier and engaged the St. Louis-San Francisco Railroad for a mere switching operation into the consignee's warehouse. In the case at bar, Pan-Atlantic was not named in the bill of lading and its liability only began when the merchandise was received into its custody. (See bill of lading, paragraph 11[g] set forth in the petition, page 2.) In the case at bar the Circuit Court of Appeals had to declare this paragraph illegal in order to hold petitioner liable because it had not received the merchandise into its custody at the time of the loss. In the *Missouri-Pacific R. R. Co.* case, this Court *sustained* the bill of lading and held that under it the Missouri-Pacific R. R. Co. was liable.

Morris, et al. v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925, 57 Fed. (2d) 1081, is not in point. There also the steamship company was the carrier named in the bill who agreed, as is stated by the Court in the opening paragraph of its opinion, page 925: "to carry the skins on the steamer *Swinburne* from Ceara a port in northern Brazil to New York. The skins were damaged by water while on the lighter in transit from the shore at Ceara to the *Swinburne*." So the damage was done during the loading, after the skins had passed into the custody of the carrier

named in the bill of lading. This was expressly pointed out by the Court. (See unitalicized second sentence in the quotation in respondents' brief, page 6.)

Reply to respondents' Point II, pages 7-9, reading: "Petitioner is not entitled to the benefit of the Fire Statute (R. S. 4282; 46 U. S. C. 182".

Respondents' Point II only emphasizes the inconsistent positions taken by the Court below in holding on the one hand that the Lighterage Company was the agent of the petitioner and that "the lighter is but a substitute for the ship" (R. 149), and on the other hand, concluding that where the Lighterage Company was exonerated under the Fire Statute, the petitioner can be held liable.

In *Earle & Stoddart* v. *Ellerman-Wilson Line,* 287 U. S. 420, cited by petitioner in its brief, page 15, Mr. Justice Brandeis had occasion to review the Federal decisions interpreting the Fire Statute, where immunity from liability for damage by fire was held to be lost. In a footnote on page 428 of the decision, he says:

> "In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act.",

citing a long line of Federal decisions. Certainly there was no failure to act on the part of the petitioner with respect to the fire and resulting damage to respondents' merchandise, because petitioner had nothing to do with the fire or operation and management of the lighter.

Petitioner's brief cites the case of *The Munaires,* 12 F. Supp. 913, where the court followed *Earle & Stoddart*

v. *Ellerman's Wilson Line, supra,* and *liberally* construed the Fire Statute to relieve the shipowner from responsibility for a fire arising on a wharf that it had leased and was using exclusively. Respondents in their brief take the position that the liberal construction of the Fire Statute in *The Munaires* case was "purely obiter." We cannot agree with respondents. The case has been widely followed by the shipping industry and its insurers and it is enough again to point out that the Circuit Court of Appeals expressly disagreed with this case, saying, "Insofar as *The Munaires* may be interpreted to express views otherwise, we cannot agree" (R. 153).

In the last paragraph of respondents' Point II, page 9, they agree that unless paragraph 4 of the bills of lading (copied in petition, pp. 2-3) is made invalid by Sec. 1 of the Harter Act, petitioner is relieved from responsibility. No court, except the Court below, has held that a shipper may not extend the Fire Statute by contract. In *Earle & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420, 428, this Court pointed out that there were 238 bills of lading on 18 different forms involved in the case, saying that many of the bills of lading contain a provision reading as follows:

> "It is mutually agreed that * * * the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or *before,* * * * occasioned by *fire* or flood, *from any cause or wheresoever occurring* * * * ." (Italics added.)

The above quoted provision is similar to paragraph 4 of the bills of lading declared illegal by the Circuit Court of Appeals in this case. The shipping industry and its insurers are entitled to have the Supreme Court pass on the important and vital question of whether or not they

may continue to contract with respect to the Fire Statute as they have heretofore. In *The Munaires, supra,* it was held they could extend the Fire Statute by contract.

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in our petition and brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 567.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Petitioner,

—against—

JAMES FYFE; and JOHN T. BAILEY doing business as United Fibre Company,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Barber-Wilhelmsen Line, hereinafter referred to as Wilhelmsen, and petitioner, Pan-Atlantic Steamship Corporation, are both vessel owners engaged in the common carriage of merchandise (R., p. 61). The vessels of the former ply between Far Eastern ports and New York; the vessels of the latter between New York and Gulf ports. For some time prior to the loss which this case involves, the two carriers had been parties to a traffic agreement under which Wilhelmsen agreed to deliver to petitioner cargo which Wilhelmsen received in the Far East for through carriage to Gulf ports, and petitioner agreed to effect on-carriage from New York to Gulf ports (R., pp. 42, 43, 63; Ex. 16, R., p. 104, offered, R., p. 63).

Under the terms of the traffic agreement the parties agreed on a division of the through freight and also agreed that the cost of such lighterage as might be required in New York Harbor would be "absorbed" by the parties on the same basis as that on which the through freight was divided between them (Ex. 16, R., p. 104, offered, R., p. 63). Petitioner had a contract with Manhattan Lighterage Corporation (hereinafter called Manhattan) for lighterage of cargoes in New York Harbor (R., pp. 59, 56; Ex. 14, R., p. 102, offered, R., p. 57).

On July 28, 1937, Wilhelmsen wrote petitioner that its S. S. "Tai Yin" was to discharge the two shipments of cargo which this suit involves at New York and that this cargo was to be on-carried to New Orleans. It instructed petitioner to arrange to have a lighter at the Wilhelmsen pier on or after August 2nd (R., pp. 43, 44, 46, 67; Ex. 1, R., p. 85, offered, R., pp. 43-44). With that letter Wilhelmsen sent petitioner copies of the two through bills of lading covering transportation of the two shipments of cargo in question from the Philippines to New Orleans (R., pp. 49, 66, 67; Ex. 1, R., p. 85, offered, R., pp. 43-44; Exs. 8 and 9, R., pp. 9, 11, offered, R., p. 49). Petitioner thereupon directed Manhattan to send a lighter to the Wilhelmsen pier to lift the cargo and transport it to petitioner's pier for loading on the on-carrying vessel (R., pp. 55, 69; Ex. 12, R., p. 99, offered, R., p. 54; Ex. 17, R., p. 105, offered, R., p. 68).

By virtue of petitioner's instructions, Manhattan sent its lighter "Sydney" to the Wilhelmsen pier and lifted the cargo, the lighter master giving a receipt to Wilhelmsen (R., p. 46; Exs. 2, 3, R., pp. 86, 87, offered, R., pp. 46-47). With the cargo on board the lighter proceeded to petitioner's pier where it was made fast at a point convenient to the berth of petitioner's steamer which was to carry the cargo to Gulf ports (R., pp. 72-74, 82). The cargo

was damaged by fire on the lighter while it lay at petitioner's pier (R., p. 82).

It was not petitioner's custom to issue bills of lading for cargo which it on-carried under its traffic arrangement with Wilhelmsen. The arrangement between the parties was that petitioner would complete the transportation under the terms of the through bills of lading which Wilhelmsen had issued in the Far East. Petitioner had no intention of issuing its own bills of lading for the cargo in suit (R., p. 70).

The through bills of lading issued by Wilhelmsen covering the cargo in this case, provided for transshipment at New York (Exs. 8, 9, R., pp. 9, 11, offered, R., p. 49) and set out that Wilhelmsen should be considered the shippers' agent to arrange for on-carriage (R., p. 19, offered, R., p. 49).

Libel was filed against Wilhelmsen, Manhattan and petitioner. On exceptions to the libel it was found below that no cause of action was stated against Wilhelmsen (R., p. 27). Manhattan filed a petition for limitation of liability and pleaded total exemption under the Fire Statute, and the District Court decreed that it was entitled to exoneration because the damage to the cargo by fire did not result from the personal neglect of the lighter owner (R., p. 139).

The petitioner's statement of the case in its petition for the writ omits the vital fact that both courts below found that the destruction of respondent's cargo resulted from the negligence of the agent which petitioner employed to satisfy its obligations as a carrier. Indeed, petitioner alleged in its pleadings that the fire which destroyed the cargo resulted from the "Manhattan's" negligence (R., pp. 31, 32).

The Issues Tried Below.

Petitioner argued below as it does in its present petition that Wilhelmsen, Manhattan and petitioner were three independent connecting carriers in that order, and as the damage arose while the cargo was on Manhattan's lighter, that petitioner should not be held liable. Both courts below held that there were but two connecting carriers—Wilhelmsen and petitioner; that Manhattan was but an agency employed by petitioner to perform its obligation; and as the cargo was damaged as the result of the negligence of the agency which petitioner chose to perform its obligation in connection with the "proper loading, stowage, custody, care * * * of * * * property committed to its * * * charge", it could not escape liability (Harter Act, Secs. 1 and 2; Title 46 U. S. C., Secs. 190, 191).

Both courts below also held that petitioner is not entitled to the exemptions of the Fire Statute (R. S. 4282; Title 46 U. S. C. 182) because petitioner was neither the owner of the lighter, nor a charterer who manned, victualed and navigated her.

POINT I.

Petitioner is liable for the negligent destruction of respondents' cargo.

Petitioner argues that Manhattan was a connecting carrier between Wilhelmsen and petitioner; and that as the damage arose while the cargo was in Manhattan's possession and as the result of the negligence of its employee, petitioner is not liable. It is urged that Manhattan was independent of both Wilhelmsen and petitioner and that neither had any stock interest in Manhattan.

Manhattan was engaged, under petitioner's direction, in lightering cargo between two piers in the port of New York. Until the exigencies of this case required the ar-

gument, no one had considered that any lighterman who might be engaged in furtherance of the through transportation, was an independent connecting carrier: the agreement between Wilhelmsen and petitioner provided for the whole of the through freight to be divided between them on a fixed basis, and the agreement between them in relation to lighterage was that its cost should be "absorbed" by the two carriers on the same basis as that on which freight was apportioned between them (Ex. 16, R., p. 104, offered, R., p. 63).

In support of its argument, petitioner cites and relies on a number of decisions of this Court to the effect that under a through bill of lading the respective connecting rail carriers can only be held liable for damage arising on their own lines (except that the initial and terminal carrier can, of course, under the Transportation Act (49 U. S. C., Sec. 20 (11)), be held liable for damage arising on any line). This principle is, we think, well established by the decisions of this Court, but, we submit, it has no application here.

The decision of this Court in *Missouri-Pacific R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366, is, we submit, directly in point. There a car of merchandise was shipped from Raceland, Louisiana, to Forth Smith, Arkansas, under a through bill of lading which named the Missouri-Pacific R. R. as the terminal carrier. As the tracks of that railroad entered Fort Smith but did not connect with the consignee's warehouse, it employed the St. Louis-San Francisco Railroad and paid it a switching charge, to switch the car from the Missouri-Pacific tracks over the St. Louis-San Francisco tracks to the consignee's warehouse. This Court held (at p. 369):

> "The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri-

> Pacific for the purpose of delivery. The Missouri-Pacific was the delivering carrier and is liable as such."

In the instant case Manhattan was not named in the bill of lading as a carrier (Exs. 8, 9, pp. 9, 11, offered, R., p. 49); it received no part of the freight; it merely was performing lighterage under the direction of petitioner, for a lighterage charge agreed upon between petitioner and Manhattan (R., pp. 56, 57; Exs. 14, 15, R., pp. 102, 103, offered, R., p. 57), so that petitioner might discharge its obligation as carrier.

Lighterage of cargo to a carrier who has agreed to transport it, when conducted by that carrier or its agency, is "part of the loading of the ship".

In *Morris, et al.* v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925 (S. D. N. Y.), affirmed without opinion, 57 F. (2d) 1081 (C. C. A. 2), during the course of lighterage to a vessel cargo sustained damage as the result of the improper condition of certain cables in connection with which the lighter was maneuvered. The bill of lading contained a provision that the carrier should not be liable for loss due to "risk of craft to or from the ship" and it provided that this exception should apply whether or not the loss resulted from the lighterman's negligence. In the course of his opinion the trial Judge (Patterson, *J.*) said (at p. 926):

> "*To the extent that the clause purports to relieve the carrier in cases of negligence of the lighterman, it is void under the Harter Act.* The transportation of the skins from the shore to the ship by lighterage was a job undertaken by the carrier, after the skins had passed into its custody. *The fact that it delegated this part of the carriage to another is of no moment. Bulkley* v. *Naumkeag Co.*, 24 How. 386, 16

> L. Ed. 599; *Petersburg Line* v. *Norfolk-Virginia Peanut Co.* (C. C. A.), 172 F. 321. *The truth is that this lighterage was part of the loading of the ship, and section 1 of the Harter Act* (46 U. S. C. A. sec. 190) *renders void all provisions relieving carriers from liability for loss caused by negligence in loading cargo.* See *Insurance Co. of North America* v. *North German Lloyd* (D. C.), 106 F. 973, 976; *The Seaboard* (D. C.), 119 F. 375. So the exception is valid only in so far as the loss arose from risk of craft to and from ship and not chargeable to negligence." (Italics ours.)

The same principle was considered and the same conclusion reached in *Insurance Co. of North America* v. *North German Lloyd*, 106 Fed. 973 (Dist. of Md., aff'd 110 Fed. 420 (C. C. A. 4)). See, also, *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How. 386.

Although the master of the lighter gave Wilhelmsen a receipt for the two shipments of cargo, petitioner argues that it had nothing to do with that. Petitioner had directed Manhattan to lift the cargo and bring it to petitioner's pier. We submit that the receipt given by Manhattan, so far as concerns the issues which this case involves, was petitioner's receipt.

POINT II.

Petitioner is not entitled to the benefit of the Fire Statute (R. S. 4282; 46 U. S. C. 182).

Petitioner complains that the courts below did not afford it the benefit of the Fire Statute, although Manhattan was exonerated from liability under the terms of that statute. The Fire Statute (R. S. 4282; 46 U. S. C. 182) affords an extraordinary benefit to a vessel owner; under its terms the owner cannot be held liable for dam-

age to cargo resulting from fire even though caused by the negligence of the owner's own employee, unless that employee is of such high rank as to be the owners' *alter ego.*

Manhattan was entitled to the benefit of the Fire Statute because it owned the lighter "Sydney" and the fire resulted from the negligence of a minor employee: the mate of the barge. Petitioner is not entitled to the protection of the Fire Statute because it did not own the lighter (R., p. 59), and the Fire Statute by its terms only protects the owner and a charterer who mans, victuals, and navigates the vessel (R. S. 4286; 46 U. S. C. 186). Petitioner did not man, victual or navigate the lighter "Sydney" (R., p. 58).

> *Petition of E. I. Du Pont de Nemours & Co., Inc.*, 18 F. (2d) 782-3, affirmed 19 F. (2d) 354 (C. C. A. 2).

In *The Munaires*, 12 Fed. Supp. 913 (E. D. of La.), cited by petitioner on page 16 of its brief, a fire broke out on a wharf and damaged cargo there and then was communicated to a vessel and damaged cargo on her. The court found that the fire did not result from any negligence of the vessel owner. Having made that finding, the District Court for the Eastern District of Louisiana expressed the view that even if the fire had resulted from the negligence of the carrier's employees on the pier, it could not be held liable for ensuing damage to cargo on the pier because the bills of lading contained an exception from liability for damage caused by fire "from any cause whatsoever occurring"; and that while the Fire Statute only relieved a shipowner from liability in connection with fire on shipboard, it permitted a shipowner to contract for exemption from liability for fire damage to cargo on a dock "on as broad a basis as that afforded him in respect of fires occurring on shipboard". This

view was purely *obiter* for the Court found that none of the carrier's employees was negligent in any way.

When the issue has been squarely presented, it has been decided that the Fire Statute is not susceptible to such distortion or extension.

> *The City of Clarksville*, 94 Fed. 201, 204 (D. Ind.);
> *The Egypt*, 25 Fed. 320, 323-4 (S. D. N. Y.).

See also:

> *Constable* v. *National S. S. Co.*, 154 U. S. 51, 62;
> *Morewood* v. *Pollok*, 18 Eng. Law & Eq. 341, 118 Eng. Rep. 614, 616.

The bill of lading exception on which petitioner relies in the present case, is made invalid by Section 1 of the Harter Act. It must necessarily be petitioner's argument that although it is clear that the Fire Statute does not by its terms afford petitioner any relief, while the Harter Act definitely governs the rights of the parties, inasmuch as petitioner would have been entitled to the benefit of the Fire Statute if it had owned the lighter, the Court should afford it the benefit of that statute and disregard the Harter Act.

CONCLUSION.

The respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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